No. 3913

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN,

Bankrupts

C. F. MASON and WM. McD. OWEN,

Bankrupts

GEORGE P. KIER, Trustee

Appellant

JOSEPH F. BIRCH, Jr., Appellee

BRIEF OF APPELLEE

Upon appeal from the United States District Court, for the Southern District of California, Southern Division

PATTERSON SPRIGG,
Attorney for Appellee,
512 Southern Title Building
San Diego, California

WATSON-JONES, INC., PRINTERS, SAN DIEGO, CAL.

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In re McIntyre, 181 Fed., 955-8.
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Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

vs.

JOSEPH F. BIRCH, JR.,

Appellee.

BRIEF OF APPELLEE

Further Statement of Facts

In addition to the facts set out by appellant we would add:

On November 3, 1920 Birch was the owner and in possession of three certificates of 100 shares each of stock in the Ray Consolidated Copper Company, fully paid for, and on that date delivered them, endorsed in blank, to Mason & Owen, Stock Brokers, with oral instructions to Mason & Owen to send said stock to Logan & Bryan in New York City, and obtain from them an acknowledgment in writing that they had received said

stock from Birch and held the same subject to his order and instructions. (Record, Page 7 Par. -III-).

Receipt was given by Mason & Owen to Birch for said stock. (Record, Page 9).

On the same date Birch signed the pledge agreement Exhibit B (Record, Page 10) which provides.

> Second: That all securities.... now or hereafter carried in my account or deposited to protect the same, may be loaned or pledged by you, either, separately or together with other securities belonging to others, whether for the sum due thereon or for a greater sum; that said securities.... may be transferred to your account on the books of the corporation, may be sold by you, whether in whole or in part, without notice to the undersigned, *at any time when in your judgment the margin of protection in my account shall become impared to a point where you deem it unwise to carry longer.* (Our Italics)

This agreement pre-supposes that Birch must trade or become indebted on marginal trades to Mason & Owen before said agreement could become effective. It is a fact and so stipulated that Birch never purchased or negotiated for the purchase of any stock with Mason & Owen or had any business dealing of any nature except the delivery to Mason & Owen of said stock only for the purpose of sending it to Logan & Bryan to be held subject to the order of said Birch, and not otherwise. (Record, Page 9).

As said by Judge Bledsoe in his opinion of August 30, 1921,

> "It is in evidence that there were no marginal transactions had or authorized between Birch and

> Mason & Owen and Logan & Bryan, and it is in this wise apparent that there was no authority actually given to Mason & Owen to pledge the Copper Stock. In other words, the circumstances under which they were authorized to pledge the Copper Stock, to-wit, marginal trade transaction or the like between them and Birch never came into existence, so that while they had blanket authority to pledge the stock, the specific circumstance actually authorizing them to exert the authority, never came into being."

On November 20, 1920 prior to the filing of the petition in Bankruptcy Birch demanded his stock from Mason & Owen and from Logan & Bryan; the later holding said identical certificates of stock and still retain possession of the same though they make no claim to said stock, and the title to the same is now and always has been in the name of the said Joseph F. Birch, Jr. (Record, Page 8, Par. 5).

Petition in bankruptcy was filed December 6, 1920. Subsequently all stocks purchased from Mason & Owen on margin was sold by Logan & Bryan under order of Court to satisfy the indebtedness of Mason & Owen to Logan & Bryan, the proceeds of said sale of marginal stock more than paid all of the Mason & Owen indebtedness to said Logan & Bryan, and the marginal stock were the only ones sold by Logan & Bryan to liquidate their claims. (Record, Pages 17 and 18 f).

Twenty-one securities, including the three hundred shares of Ray Consolidated stock, all fully paid for, and with no trade pending thereon, were not sold but survived the liquidation. (Record, Page 18 f).

The 300 shares of Ray Consolidated stock at the time of bankruptcy was the only Ray Consolidated stock held by Mason & Owen, or Logan & Bryan for said Mason & Owen, and no one other than Birch make any claim to Ray Consolidated on the books of Mason & Owen. No claim has been filed against Mason & Owen for Ray Consolidated by any other person than Birch.

All stocks in the hands of Logan & Bryan, prior to the bankruptcy, was held by them as pledged to secure the indebtedness of Mason & Owen to them. Among these they held the 300 shares of Ray Consolidated, so pledged, but without authority or consent from Birch, and without his knowledge. (Record, Page 9).

ARGUMENT

Appellant seems to base his application for reversal of the order of the District Court upon the theory that Birch signed unconditional authorization to Mason & Owen to pledge his stock "for any sum that they saw fit" admitting at the same time that Birch had no dealings with Mason & Owen other than the delivery to them of his certificates of stock to be sent to Logan & Bryan for his use and benefit, (Record, Page 9). The conditions in the so-called pledge agreement are that there must be marginal trading and that the account of the trader must be impared, or reduced to warrant the pledge of securities. In the present case neither condition existed, and the pledge of the Birch stock by Mason & Owen was larceny pure and simple, as having been pledged without the consent or knowledge of Birch. The Pip-

pey case at page 958 In re McIntyre 180 Federal 955 is wholly in point.

The 300 shares of Ray Consolidated Stock is *sufficiently identified*, since at the time of the bankruptcy there was in the hands of Logan & Bryan, to the credit of Mason & Owen, an equal amount of the same kind of stock and no one else claimed it (in fact the actual certificates numbered 69806, 69807 and 69808 representing 100 shares each of the said Ray Consolidated, and the identical certificates delivered to Mason & Owen by the said Birch. (Record, Page 17 c).

Gorman vs. *Littlefield*, 229 U. S., 19, at 24-25;

In re Solomon & Co., 268 Fed., 108;

In re Wilson, 252 Fed., 636, at 651.

Duel vs. *Hollins*, 241 U. S., 523, Syl.;

The identification is complete whether the said stock is in the hands of a pledgee, Logan & Bryan, or found in possession of Mason & Owen.

In re Wilson, 252 Fed., 639-654;

Spokane County vs. *First National Bank of Spokane*, 68 Fed., 979-983;

In re Royce, 143 Fed., 182.

In an unbroken line of decisions the Courts hold that "securities held by stock brokers as collateral to their customers accounts may, where the latter are not in-

debted to the brokers, be recovered by such customer from the Trustee in bankruptcy of the broker's Estate."

Thomas vs. *Taggart*, 209 U. S., 385, Syl. 3;

Gorman vs. *Littlefield*, 229 U. S., 19-25.

In the case of *Gorman* vs. *Littlefield*, *supra*, the stock was bought on the order of the customer, fully paid for, left in the broker's possession, found in the hands of the Trustees of the bankrupt broker, and was ordered by the Court to be delivered to the customer.

Richardson vs. *Shaw*, 209 U. S., 365.

In the case at the bar none of the marginal traders paid for their stock. All of their stocks were sold in order to liquidate the indebtedness to the pledgee, Logan & Bryan, and the marginal stocks more than paid that debt: (Record, Page 17-18) if the marginal traders had wished to save themselves any loss they could have paid up the amount due on their purchase, demanded their stock, and thus place themselves in a preferred class, the same as those who had paid for their stock in full before the bankruptcy. If the marginal stock did not pay the pledged indebtedness in full, the preferred holders of stock must share pro rata such deficiencies in in the amount of the pledged indebtedness, as was not covered by the pure marginal stock. In our case, however, the marginal stock fully paid Logan & Bryan, (the pledgee,) their entire indebtedness, and the Birch stock, with others paid in full survived the liquidation.

This position is fully set forth in re Wilson, 252 Fed., 635-6, in what is known as the Rolph's claim. There

the Class "A" creditors were those whose stock was fully paid for, and Class "B" the pure marginal traders, exactly the position in the case at bar but with this difference, that in our instant case there is no deficiency to be shared by the preferred or Class "A" claimants. All the pledgee's debt was paid out of the marginal stock so there is no debt to be shared by the Ray copper stock and the other twenty paid-in-full stocks which survived the liquidation by the pledgee, while in the Rolph claim (Wilson case) there was not sufficient of the marginal stock when sold, to pay the pledge so that the Class "A" or preferred claimants had to share the defficiency and Rolph received his stock but had to pay in the value of his stock and share in the Class "A" claims in proportion to the amount he paid in and that the Class "B" lost their whole margin on which they were gambling for a rise in market, Class "A" sharing only what debt to pledgee was not paid by Class "B".

In a recent case in this Court, No. 3844, wherein the same parties were appellants as in the case at bar, and one J. E. Steer was the appellee, this Honorable Court reviewed the facts therein and the decisions applicable thereto, wherein Steer made claim for 100 shares of Midvale Steel Stock, and this Court affirmed the order of the District Court.

We believe that the equities of the appellee, Joseph F. Birch in this case, are superior to the equities of the said J. E. Steer, for the reason that there are no complicated facts. Birch owned the Ray Consolidated Stock, fully paid for, when delivered to Mason & Owen on Novem-

ber 3, 1920, to be sent to Logan & Bryan, to be by them held for his use and benefit. Birch was never a trader with Mason & Owen. Mason & Owen pledged the Birch stock with Logan & Bryan, with other stock, to secure their debt without authority or the knowledge of Birch. We respectfully submit the conclusions reached in the Steer case will apply to the case at bar, and as the Court said therein, "generally the rule of decision is where stock certificates have been delivered to a broker as security for trades, but without authority to pledge, and where there is no trade pending and the stock has been pledged by the broker, if the loan has been liquidated and it has not been necessary to sell the stock in order to satisfy the debt for which it was pledged, the customer may recover."

In re McIntyre, 181 Fed., 955, 958;

In re Graff, 117 Fed., 343;

Kean vs. *Dickenson*, 152 Fed., 1022.

APPELLANT'S AUTHORITIES.

Appellant has referred in his brief to three cases as follows:

In re Wilson, 252 Fed., 631, (639);

Whitlock vs. *Seaboard Nat'l Bank*, 60 New York Supp., 611;

Unangst vs. *Roe* 177 New York Supp., 706, (712), claiming that they support his contention that all stock pledged whether rightfully or wrongfully, must contribute ratably.

These cases hold where the pledged securities are of the same class, it would be inequitable to select for sale

some stock and not others, thereby saving the unsold-stock for the owners, without the burden of contribution, as said in the Wilson case. We do not question the logic or equitable conclusion of these cases, we do say however, they have no application to the case at bar; here, the Birch stock was fully paid for, delivered to Mason & Owen for a special purpose and by them pledged without the knowledge or the consent of Birch to secure their personal debt; appellant justifies this, upon the assumption that Birch gave general authority to pledge his stock, this construction of the so-called pledge agreement is as fallacious as the assumption that Mason & Owen did not know they were misappropriating the Birch stock, when, on the same day they received it, they sent it to Logan & Bryan to secure their personal debt.

Appellant's claim, that the Birch stock should contribute with the marginal stock to the payment of the debt of Mason & Owen, upon the theory that there was a general authorization by Birch to pledge his stock, is based upon such false premises, that it is hardly believable that one could so misinterpret the English Language.

In view of the unbroken line of bankruptcy cases here cited and the failure of appellant to cite a single bankruptcy case contrary to the well-established equitable principle governing the case at bar, it is hard to escape the conclusion that appellant has indulged in a frivolous appeal from the order made by the District Court; this comes with greater force in the face of the ruling of this Court in the Steer case decided June 19th, 1922.

We submit that the order of Judge Bledsoe made March 6th, 1922, for the delivery to us of the stock, and all the accrued dividends should be affirmed.

Most Respectfully,

PATTERSON SPRIGG,

Attorney of Appellee.